CHUAH TEONG HOOI & ANOR.

v.

EMPLOYEES PROVIDENT FUND BOARD.

HIGH COURT MALAYA, PENANG
WAN ADNAN J
[ORIGINATING SUMMONS NO. 31-527-87 & 31-529-87]
17 APRIL 1990

COMPANY LAW: *Appointment of receivers at instance of debenture holder - Assets of company insufficient to meet receiver's costs and charges - Debenture holders - Employees Provident Fund Act Board - Priorities - Employees Provident Fund Act 1951 s. 15(1) - Sections 191, 292 Companies Act 1965.*

The plaintiffs are the receivers and managers of Atlas Intek (M) Sdn. Bhd. appointed pursuant to 2 debentures dated 13 August 1984 and 13 August 1985 respectively on 1 November 1985.

At the time of appointment the liabilities of the company amounted to RM133,908,000 which included the employer's monthly contribution provided in s. 7(1) of the Employees Provident Fund Act 1951 for the months of June to October 1985 in respect of employees of the company due to the Employees Provident Fund Board.

The total costs, charges and expenses incurred by the plaintiffs from 1 November 1985 to 30 April 1989 amounted to RM6,454,000 and the proceeds of sale of the company's assets subject to the floating charge amounted to only RM4,713,000.

In view of the fact that the total proceeds of sale are less than the total costs and expenses incurred by the plaintiff, a direction of the Court is applied for as to the priority for payment between the claims of Employees Provident Fund Board and the plaintiff's claim.

Held:

[1] The Court agrees that under the Companies Act, the Employees Provident Fund claims do take priority over the claims of the debenture holders under the floating charge but then do not gain priority over the claims of receivers and managers for receivership costs and expenses.

[2] Since the deductions for Employees Provident Fund contribution were made when the employees were paid their nett wages, a sum for the said sum equivalent to the total amount of deduction must be regarded as the sum under s. 15. Therefore, wherever there is a sum due from any employer as his contribution to the Employees Provident Fund, from any monies in the hands of the company or its receivers and managers, the amount due to the Employees Provident Fund must be paid first.

[Application in favour of defendants.]

Case referred to:
In re Glyncorrwg and General Trust Co. Ltd. v. The Company [1926] 1 Ch 951

Legislation referred to:
Companies Act 1965, ss. 183(3), 191(1), 292(3), (4), (5)
Employees Provident Fund Act 1951, ss. 7(1), 8(1), 10, 15, (a), (b), 16A(1)(c), 17A

For the plaintiffs - Foo Say Keow, Ahmad Murad bin Abdul Aziz; M/s. Murad & Foo
For the defendant - N.G. Sivanandan, Karin Lim Ai Ching; M/s. Presgrave & Matthews

JUDGMENT

Wan Adnan J:

This is an application under s. 183(3) of the Companies Act 1965 which states as follows:

> (3) A receiver or manager of the property of a company may apply to the Court for directions in relation to any matter arising in connection with the performance of his functions.

The plaintiffs are the receivers and managers of Atlas Intek (M) Sdn. Bhd. (the company) appointed pursuant to the provisions of the debentures dated 13 August 1984 and 13 August 1985 (the debentures). The appointments were effective from 1 November 1985. The company is insolvent and unable to meet all its outstanding liabilities. At the time of the appointment of the plaintiffs as managers and receivers the liabilities of the company totalled RM133,908,000. Included in the liabilities are the following:

(i) the employer's monthly contributions provided in s. 7(1) of the Employees Provident Fund Act 1951 for the months of June to October 1985 in respect of employees of the company totalling RM163,489;

(ii) the employees' monthly contributions provided in s. 7(1) of the Employees Provident Fund Act 1951 for the same period in respect of the employees of the company totalling RM135, 968.

The total costs, charges and expenses incurred by the plaintiffs for the period from 1 November 1985 to 30 April 1989 in connection with the exercise of their powers under and/or pursuant to the debentures amounted to RM6,454,000. As at 30 April 1989 the proceeds of sale or realisation of the assets of the company subject to the floating charges amounted to only RM4,713,000.

In view of the fact that the total proceeds of sale or realisation of the assets of the company are less than the total costs and expenses incurred by the plaintiffs a direction of the Court is applied for as to the priority for payment between the claims of the Employees Provident Fund Board and the plaintiffs' claims.

Clause 8 of the debenture dated 10 August 1984 provides as follows:

> 8.1 Subject to any claims ranking in priority to and/or *pari passu* with those of the facilities under this debenture, all monies realised upon a sale or collected or received by the agent and/or the receiver and/or manager in the exercise of his power, authorities and discretions shall be applied by the agent or, as the case may be, the receiver and/or manager as follows:
>
> 8.1.1 In relation to proceeds from the sale of the fixed assets covered by the fixed charge:
>
> **firstly**, in payment of all costs, charges and expenses and liabilities incurred by the agent or, as the case may be, the receiver and/or the manager in connection with the exercise of its or his powers under and pursuant to the loan agreement and this debenture;
>
> **secondly**, in or towards payment to the A co-lenders *pari passu* and rateably of all interest accrued and remaining unpaid on the principal monies due by the company to A co-lender pursuant to the loan agreement and this debenture;
>
> **thirdly**, in or towards payment to the A co-lenders *pari passu* and rateably of the principal monies due by the company to the A co-lenders pursuant to this debenture;

fourthly, in or towards payment to the B co-lenders *pari passu* and rateably of all interest commission and fees accrued (*sic*) and remaining unpaid on the principal monies due by the company to the B co-lender pursuant to the loan agreement and this debenture;

fifthly, in or towards payment to the B co-lenders *pari passu* and rateably of the principal monies due by the company to the B co-lenders pursuant to this debenture;

sixthly, the surplus, if any, shall be paid to the company or other person or persons legally entitled to the same.

8.1.2 In relation to proceeds from the sale of the non-fixed assets covered by the floating charge:

firstly, in payment of all costs, charges and expenses and liabilities incurred by the agent or, as the case may be, the receiver and/or the manager in connection with the exercise of its or his powers under and pursuant to the loan agreement and this debenture;

secondly, in or towards payment to the B co-lenders *pari passu* and rateably of all interest commission and fees accrued and remaining unpaid on the principal monies due by the company to B co-lender pursuant to the loan agreement and this debenture;

thirdly, in or towards payment to the B co-lenders *pari passu* and rateably of the principal monies due by the company to the B co-lenders pursuant to this debenture;

fourthly, in or towards payment to the A co-lenders *pari passu* and rateably of all interest accrued (*sic*) and remaining unpaid on the principal monies due by the company to the A co-lender pursuant to the loan agreement and this debenture;

fifthly, in or towards payment to the A co-lenders *pari passu* and rateably of the principal monies due by the company to the A co-lenders pursuant to this debenture;

sixthly, the surplus, if any, shall be paid to the company or other person or persons legally entitled to the same.

There are similar provisions in the debenture dated 13 August 1985.

Section 191(1) of the Companies Act 1965 states as follows:

> Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders of any property comprised in or subject to a floating charge, then if the company is not at the time in the course of being wound up, debts which in every winding up are preferential debts and are due by way of wages, salary, vacation leave or superannuation or provision fund payments and any amount which in a winding up is payable in pursuance of s. 292(3) or (5) shall be paid out of any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts.

According to Mr. Foo, Counsel for the plaintiffs, the priority for payments in accordance with the provisions of the debentures was as follows:

Firstly - payment for costs charges and expenses for receivership.

Secondly - payment to debenture holders

Thirdly - payment to the EPF board.

He however conceded that the priority was changed by ss. 191 and 292 of the Companies Act 1965 but contended that the change was not to the extent that the EPF claims gained priority over the claims of the receivers and managers. The EPF claim which is a preferential debt only took priority over the debenture holders' claims. Section 292(4) provides as follows:

> So far as the assets of the company available for payment of general credits are insufficient to meet any preferential debts specified in ss. (1)(b), (d) and (e) and any amount payable in priority by virtue of s. (3), those debts shall have priority over the claims of the holders of debentures under any floating charge created by the company, and shall be paid accordingly out of any property comprised in or subject to that charge.

I was referred to the case of *In re Glyncorrwg and General Trust Co. Ltd. v. The Company* [1926] 1 Ch 951 where the priority was fixed as follows:

First, cost of realisation.

Secondly, the costs including remuneration of the receiver.

Thirdly, the costs, charges and expenses of debenture trust deed including the trustees' remuneration.

Fourthly, the plaintiffs' cause of action.

Fifthly, preferential creditors, and

Sixthly, the debenture holders.

I do agree that under the Companies Act the EPF claims do take priority over the claims of the debenture holders under a floating charge, but they do not gain priority over the claims of the receivers and managers for receivership costs and expenses.

I now proceed to consider the provisions of the Employees Provident Fund Act 1951 (the EPF Act).

Under s. 7(1) of the EPF Act every employee and every employer of a person shall be liable to pay monthly contributions at the rate set out in the third schedule to the EPF Act and in s. 8(1) it is provided that the employer shall, in the first instance, be liable to pay both the contributions payable by himself and also the contributions by the employee. Under s. 10 the employer can recover from the employee the amount of the employee's contribution by means of deduction from the wages due to the employee. Section 11 makes the employer liable to pay interest if the contributions payable are not paid within the prescribed period. Under s. 16A(c) it is an offence if an employee fails within the prescribed period to pay the monthly contributions. Whenever any property of an employer is sold under s. 17A of the EPF Act the proceeds of the sale may be distributed only after provision has been made for the payment of contributions payable by the employer.

The EPF Act makes it obligatory upon the employer to pay first the monthly contributions payable by himself and by the employee. It is an offence if he fails to do so. So far as the EPF is concerned it is the employer who must pay both the contributions. Whether or not he wants to or is able or unable to recover from the employee the contributions which he pays on behalf of the employee is no concern of the EPF. The liability to pay is on the employer. Section 15 of the EPF Act provides as follows:

> Notwithstanding anything to the contrary contained in any other written law:

(a) no sum deducted from the wages of a member of the fund under s. 10;

(b) no amount payable by the employer as his contribution; and

(c) no amount standing to the credit of a member of the fund,

shall be assignable or transferable or liable to be attached, sequestered or levied upon for, or in respect of, any debt or claim whatsoever, nor shall the official assignee be entitled to or have any claim on any such sum or amount:

Raja Arshad bin Raja Tun Uda, one of the plaintiffs in his affidavit sworn on 10 November 1989 says in para. 5 as follows:

5. I verily say in the months of July until October 1985 the company paid its employees only their nett wages. However, nowhere in the company's records and accounts can it be seen that actual monies (representing the alleged deductions for the purpose of contributions to EPF) actually were appropriated from the gross wages and put aside in the company's funds and or assets. At all material times, there were and are no real monies in the company's funds representing any actual deduction from the employees' wages for the purpose of EPF contributions.

I think what the receiver is saying is that although the employees were paid only their nett wages (meaning, deductions had been made from their gross wages) no deductions were made for EPF contributions under s. 10. I cannot accept this conclusion. Since deductions were made during the period in question from the employees' gross wages it can be assumed that the deductions also included deductions for the EPF contributions. The EPF is not making any claim in respect of any earlier period. Therefore there must have been deductions for EPF contributions for the earlier period. The sums deducted come under the sum in s. 15(a). Section 15(b) refers to the amount which the company still owes the EPF as their contributions. These sums are not liable to be attached in respect of any claim whatsoever including the claims by the plaintiffs as receivers and managers.

The amount now in the hands of the plaintiffs as receivers and managers as at 30 April 1989 is RM4,713,000. They say these are the proceeds of sale or realisation of assets of the company subject to the floating charges. Since deductions for EPF contributions were made when the employees were paid their nett wages a sum from the said sum equivalent to the total amount of the deductions must be regarded as the sum under s. 15(a). That sum is RM135,968. The amount payable by the company under s. 15(b) is RM163,489. Whenever there is a sum due from any employer as his contributions to the EPF, from any monies in the hands of the company or its receivers and managers, the amount due to the EPF must be paid first. Under s. 15 these sums must first be paid to the EPF Board.

It is therefore my view that notwithstanding the provisions of the Companies Act 1965 the EPF claims take priority over the claims of the plaintiffs for their costs and expenses. I therefore give direction that from the sum of RM4,713,000 the claims of the EPF Board amounting to RM299,457 shall be paid forthwith together with the rate of dividend and interests under ss. 8(3) and 11(1) of the EPF Act.

I give a similar direction on the application under originating summons no. 529/87. The claims of the EPF Board of RM280,954 must be paid forthwith together with the rate of dividend and interests under ss. 8(3) and 11(1) of the EPF Act.

Costs are to be paid by the plaintiffs as receivers and managers.

Also found at [1990] 2 CLJ 44